

INDIANAPOLIS LAW CLUB

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By Ronald J. Waicukauski

Price Waicukauski & Riley, LLC

301 Massachusetts Ave., Indianapolis, IN 46204

rwaicukauski@price-law.com

317-633-8787

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Advocacy Tip of the Month: Do not move to strike portions of an opponent’s appellate brief.

IN THE NEWS:

Flex-Time Partners

New York, November 21, 2006 - Weil, Gotshal & Manges, LLP announced today the election of twenty new partners. In its announcement, Weil Gotshal stated that, for the first time, the new partnership class was comprised of a majority of women. Further, the firm stated, this election was also marked by the creation of a new partnership category, "flex-time partner," which was created for new partners making a long-term career choice to work on a flexible schedule. Among the newly elected partners were included two flex-time partners. (The firm noted, in this regard, that the flex-time option is available to both men and women entering the partnership).

E-Discovery Rules Take Effect December 1

From the Wall Street Journal: 11/28/06

Federal courts are officially entering the electronic age. New procedural rules are scheduled to take effect Friday requiring litigants in federal court to provide adversaries with relevant "electronically stored information"....

"Lawyers will now have to know about their clients' computer architecture: How do they store their data? How do their computer systems operate? ...," says Alvin Lindsay, a partner with Hogan & Hartson LLP.]

1. Highlights of changes in the federal rules on E-Discovery:

- Counsel must meet and confer within the first 90 days of litigation to address e-discovery issues including the form and preservation of "electronically stored information" ("ESI") and how ESI should be produced and reviewed. Rule 26(f)(3).
- ESI that is identified as not "reasonably accessible" because of undue burden or cost (*e.g.*, inaccessible archive tapes, old legacy systems) does not have to be produced unless the requesting party can show good cause, and most likely pay for the cost of retrieval. Rule 26(b)(2)(B).
- Pursuant to Rule 33(d), a party responding to interrogatories may answer by allowing the opposing party to search the business records of the party, including the electronic business records. A party who responds to interrogatories by offering documents in electronic form, must do so in a way that enables the opposing party to derive the information requested, including providing technical support if necessary.
- Pursuant to Rule 34(a), a reviewing party may "test" or "sample" electronically stored information before determining the scope of a full request to produce.
- Safe harbor provision: Rule 37(g): "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."

P.S.: Last year, a Florida judge ruled that Morgan Stanley was liable for fraud, in part for failing to turn over some email evidence in a suit brought by financier Ronald Perelman. Following a jury verdict, the judge awarded Mr. Perelman \$1.58 billion in damages. And earlier

this year, Morgan Stanley agreed to pay a record \$15 million fine to settle an SEC probe into its failure to preserve e-mails.

P.P.S.: For more info on the new e-discovery rules and other matters: CLE program, *Federal Civil Practice*, Dec. 7, 2006 1:30 to 4:45 p.m. at Barnes & Thornburg Conference Center. See TheIndianaLawyer.com.

2. Discovery omissions; duty to supplement; attorney misconduct; work product; comparative fault. *Outback Steakhouse of Florida v. Markley*, 2006 WL 3218531 (Ind. 11/8/06)(Boehm)

David and Lisa Markley were severely injured on July 21, 1997 when their motorcycle was struck by a car driven by William Whitaker. Whitaker had been drinking earlier in the evening at the grand opening of the Outback Steakhouse in Muncie and later had stopped at Van's, a bar in Muncie. The Markleys sued the Outback under the Dram Shop Act and won a jury verdict which assessed the Markleys' damages at \$60 million and found the Outback to be 65% at fault. Judgment was entered for \$39 million and the Outback appealed. The Court of Appeals affirmed.

The Supreme Court granted transfer and vacated the judgment, addressing a number of issues:

- *Plaintiffs' Omission in Initial Response to Interrogatories.* One or two months after the accident, Patrice Roysdon, a waitress at the Outback, went to the office of one of the plaintiff's attorneys (Mick Alexander) and told him that Whitaker was visibly intoxicated when she served him on the evening of the collision. In 1999, interrogatories were served on plaintiffs asking them to state each fact on which they rely to support their allegation that the Outback provided alcohol to Whitaker with actual knowledge that he was visibly intoxicated and the names of the persons with knowledge of such facts. The Markleys response failed to mention Roysdon or her statement. The Supreme Court found this response "patently deficient," and concluded that the omission violated Trial Rules 26 and 33 and constituted misconduct within the meaning of Trial Rule 60(B)(3). (The latter rule authorizes vacating a judgment for "fraud, misrepresentation, or other misconduct of an adverse party.")
- *Plaintiff's Failure to Supplement Interrogatory Answer.* Plaintiffs contended that they had omitted any mention of Roysdon or her statement to Alexander because they had not intended to rely on her testimony at trial. Roysdon was deposed and at her deposition denied that Whitaker was visibly intoxicated when she served him. On a Sunday, after the trial had begun, Roysdon met with Alexander and said she had lied in her deposition and planned to testify at trial that Whitaker was visibly intoxicated. The next morning, Alexander called Roysdon as plaintiffs' witness and she testified accordingly. On appeal, Outback argued that upon learning of Roysdon's change of testimony on Sunday and deciding to rely thereon, Alexander had a duty to supplement the prior interrogatory answer. The Supreme Court agreed, finding that Alexander should have made an effort to supplement the response before calling Roysdon as a witness. In so holding, the Court rejected the notion that the duty to supplement does not continue during trial—noting that Trial Rule 26 does not say that the duty ceases at the onset of trial.

Trial Rule 26(E) states: "Supplementation of responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

- (1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to:
 - (a) the identity and location of persons having knowledge of discoverable matters, and
 - (b) the identity of each person expected to be called as an expert witness at trial, the subject-matter on which he is expected to testify, and the substance of his testimony.
 - (2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which
 - (a) he knows that the response was incorrect when made, or
 - (b) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.
 - (3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.”
- *Misconduct in closing argument.* In closing argument, Alexander attacked the credibility of Outback’s counsel based on statements he had made in opening statement about the expected testimony of Roysdon. In light of plaintiff counsel’s shortcomings in discovery, the Court concluded that this attack was itself “misconduct.” [In hindsight, it looks like a possible set-up. Alexander knows that Roysdon has given an inconsistent statement but withholds it. Defendant’s counsel makes promises in opening statement about Roysdon supporting his case and she then testifies to the contrary. Alexander then exploits Roysdon’s testimony not only to support his case directly on the merits but also to attack defendant’s counsel for being disingenuous, thereby taking unfair advantage of defendants’ ignorance of the whole story.]
 - *Motion for relief from judgment.* A violation of the Code of Professional Responsibility may provide the basis for a finding of “misconduct” to support vacating a judgment under T.R. 60(B)(3). Misconduct under T.R. 60(B)(3) may be unintentional, including accidental omissions where there was no intent to deceive, and may include violations of discovery rules.
 - *Work product privilege.* The work product privilege is not limited to tangible items. [The Court of Appeals had held otherwise]. The work product privilege does not extend to witness statements. “Roysdon’s statements to Alexander do not reveal mental impressions or legal theories. They are simply potential evidence that enjoys no privilege.” This seems to be a misstatement of the law. Courts recognize two types of work product: opinion work product and ordinary work product. The statement may not be opinion work product but it should qualify as ordinary work product—trial preparation material that does not disclose the lawyer’s impressions or opinion. Non-party witness statements have previously been protected work product, subject to disclosure only upon a showing of substantial need. T.R. 26(B)(3)
 - *Surprise witness.* When confronted with a surprise witness, ordinarily the proper remedy is to move for a continuance and the failure to so move may waive any alleged error. No waiver, however, will be charged against a party who has been kept ignorant of relevant facts by the opponent’s misconduct.
 - *Discovery sanctions.* Since the Markleys were not directly involved in the discovery violations, the Court refused to order exclusion of Roysdon’s testimony as a discovery sanction. Since the record is unclear as to whether the discovery violations were

intentional or negligent, the Court refused to order plaintiff's counsel to pay the defendants' attorney's fees.

- *Comparative fault instructions.* The trial court erred in giving an instruction that required the jury to find all elements of civil liability against a non-party before it could allocate fault to the non-party. All that a jury must find is that the non-party caused or contributed to cause the injury.
- *Objections to instructions.* A tender of a proper objection is sufficient to preserve an objection to an improper instruction. You need not lodge a direct objection to the instruction.

Additional lessons:

1. When supplementing discovery is required, "it may be reasonable and appropriate to modify the method of supplementing a discovery response if new information is discovered on the eve of or during trial." Consider phone call, email or fax. It's making the effort that will matter most.
2. Be candid with the court. Alexander called Bruce McLaren as a witness for the plaintiffs. McLaren was a client of Alexander's who two weeks earlier had been indicted and pled guilty to wire fraud. Prior to his testimony, Alexander informed the court and opposing counsel of the indictment but not of the guilty plea. The Supreme Court found that this non-disclosure did not have legal consequences in the case but raised sufficient questions about Alexander's candor with the trial court to warrant an investigation by the Indiana Disciplinary Commission.

3. Duty to expedite litigation. In the Matter of Merrill "Scooter" Moores, 854 N.E.2d 350 (Ind. 9/29/06)(per curiam)

Scooter Moores represented co-owners of a parcel of land. A foreclosure action was brought as to this land but it was not the correct property. The correct property securing the loan was another parcel owned by only one of Moores' clients. After the mortgage company moved for summary judgment, Moores did not file a response and did not appear at the summary judgment hearing. He purposely failed to appear because he was concerned he would have to reveal that the foreclosure action was brought against the wrong property. Moores planned to move to set aside the summary judgment pursuant to T.R. 60(B) and pursued this strategy in order to delay foreclosure on the correct property.

Rule 3.2 of the Rules of Professional Conduct states: "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." The Supreme Court concluded: "Delaying court proceedings merely to obstruct the course of legal proceeding is not an acceptable means of conducting litigation. In this case, stalling was not consistent with the interests of [one of respondent's clients]." For this reason, among others, Moores was suspended for 30 days.

Lesson: We have a professional duty to expedite litigation. Comment to Rule 3.2: A failure to expedite will *not* "be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose."

4. Peremptory challenges based on religious affiliation and occupation—Highler v. State, 854 N.E.2d 823 (Ind. 10/4/06)(Boehm)

Highler was charged with rape in Allen County. The jury panel of 47 included only one African-American who was struck by the prosecutor. Striking the only African-American on a panel “establishes a prima facie case” of discrimination and shifts the burden to the prosecutor to present a non-discriminatory explanation for the strike. The prospective juror who was struck was the pastor of a church and the prosecutor explained that he struck the man because “I never take any Pastors, Ministers, Reverends, [or] Priests on my jury panels just because they’re more apt for forgiveness.” The court found this to be a race-neutral explanation.

Defendant argued, that even if race-neutral, the challenge was improperly based on religious affiliation. The Indiana Supreme Court holds that religious affiliation, like race and gender, is an impermissible basis for striking a prospective juror. The Court finds, however, that the challenge here was not based on religious affiliation but on occupation. Striking a jury based on occupation, including an occupation as a religious leader, is not unconstitutional.

Lessons:

1. You cannot exercise a peremptory challenge based on religious affiliation but you can based on occupation.
2. If you object to a peremptory challenge on Batson grounds, be sure to specify the nature of the discrimination. The Supreme Court acknowledged that the defendant had not preserved for appeal the questions of discrimination on religious or occupational grounds. Although not preserved, the Court still addressed these issues, explaining that they were doing so “to give guidance to trial courts because the Court of Appeals has addressed them and we believe they are likely to recur.”

5. Motion to disqualify counsel. Knowledge A-Z, Inc. v. Sentry Insurance (Ind. Ct. App. 11/27/06)(Sharpnack)

Knowledge suffered a loss of \$1.3 million due to employee theft and asserted a claim under its insurance policy with Sentry. Knowledge’s owner was interviewed extensively by Sentry in a recorded statement but this statement was not under oath. Sentry then attempted to conduct an examination under oath of Knowledge’s owner but he failed to appear. Knowledge offered to stipulate that the earlier interview was truthful as though it was under oath but Sentry wanted a new examination under oath.

Sentry denied coverage. Knowledge sued and Sentry moved for summary judgment, arguing, among other things, that Knowledge breached the policy by failing to submit to examination under oath. Knowledge did not file a timely response to the motion for summary judgment but after the deadline had passed, moved to disqualify Sentry’s counsel and moved to strike the motion for summary judgment. The trial court (Judge Proffitt in Hamilton County) denied Knowledge’s motions and granted Sentry’s motion for summary judgment.

The Court of Appeals finds that the motion for summary judgment was properly granted, concluding that the failure to submit to the examination under oath was a breach of contract and precluded Knowledge’s claim under the policy.

The court also finds that the motion to disqualify counsel was properly denied. The motion was based on Rule 3.7 of the Rules of Professional Conduct: “A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a *necessary* witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of

legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.”

Sentry’s counsel had corresponded with Knowledge regarding the need for examinations under oath and the need for inspection of documents. Sentry’s evidence in support of its motion for summary judgment included these letters from Sentry’s counsel. The court found, however, that the standard for purposes of Rule 3.7 is whether the lawyer is a *necessary* witness and here, the issue was Knowledge’s response to Sentry’s requests for documents and examination under oath. Knowledge failed to show that Sentry’s lawyer was a necessary witness on this issue.

Lessons:

1. An insured must submit to an examination under oath even if he has given a recorded statement to the insurer.
2. Even if a lawyer is a potential witness in a case, he will not be disqualified unless he is a “necessary” witness.

6. Attorney’s fee agreement; conversion clause. Four Winds, LLC v. Smith & DeBonis, LLC, 854 N.E.2d 70 (Ind. Ct. App. 9/19/06) (Kirsch)

Smith & DeBonis (“Smith”) had represented Four Winds in a lawsuit pursuant to a contingency fee agreement. Before the lawsuit was concluded, Four Winds terminated Smith and Smith sued to collect its fee. The fee agreement provided that if the client discharged Smith, the client agreed to pay a reasonable fee based on Smith’s prevailing hourly charge in effect at the time of termination.

The Court of Appeals upheld this conversion provision, finding that the client was liable for Smith’s hourly rate upon his discharge and that payment was due immediately. The court rejected Four Winds argument that such a provision unduly constrains a client from exercising its right to terminate an attorney. It certainly constrains any client who needs the recovery from the lawsuit in order to find the resources to pay the hourly fees. But when discharged, the attorney has a right to compensation in accordance with the terms of his fee agreement.

Lessons:

1. Consider including in your contingency fee agreement:
“If the Client discharges the Attorney, the Client agrees to compensate the Attorney for the reasonable value of the Attorney’s services rendered to the Client up to the time of the discharge based on the Attorney’s prevailing hourly charge in effect at the time of termination.”
Note: This may be less than Attorney would be entitled to under quantum meruit but allows precise determination for immediate liability.
2. Prof. Conduct Rule 1.16 provides that the client’s right to discharge his attorney is subject to the client’s liability for payment of the lawyer’s services.

7. Time limit for appeal of administrative ruling. Citizens Industrial Group v. Heartland Gas Pipeline, LLC, 2006 WL 3231340 (11/9/06)(Matthias)

On October 5, 2005, the Indiana Utility Regulatory Commission (“IURC”) issued an order in favor of Heartland Gas and Citizens Gas. On October 25, 2005, Citizens Industrial Group (“CIG”) filed a petition for reconsideration of the order. The petition was denied by the IURC on December 21, 2005. CIG filed a notice of appeal on January 20, 2006. Heartland and

Citizens Gas moved to dismiss the appeal as untimely. The motions panel of the Court of Appeals denied the motion to dismiss.

The timeliness issue was reconsidered by the panel assigned to hear the appeal. In considering the issue, the Court observed:

- The Indiana Administrative Code provides that “following a final order, any party may file with the commission . . . a petition for rehearing and reconsideration within 20 days of the final order . . .”
- This motion serves the same function as a motion to correct errors in civil practice which would defer the deadline for noticing an appeal.
- I.C. 8-1-3-2(b) provides: “The appeal *shall not* be submitted prior to [the] determination of the petition for rehearing . . .”
- Equity favors giving administrative agencies the same second chance to review their decisions as trial courts are afforded.

Nonetheless, the Court said all of these considerations made no difference in light of the plain language of Appellate Rule 9(A)(3) requiring filing of notice of the appeal within 30 dates after the date of the order “notwithstanding any statute to the contrary.” Appeal dismissed.

Lessons:

1. File your appeal of an administrative order within 30 days of the order.
2. Indiana statutes can be traps for the unwary when they address judicial procedure.

8. Interlocutory appeal. *Bridgestone Americas Holding, Inc. v. Mayberry*, 854 N.E.2d 355 (Ind. Ct. App. 11/8/06) (Najam)

The trial court granted Mayberry’s motion to compel discovery of Bridgestone’s formula for a rubber compound and then certified the issue for interlocutory appeal. A motions panel of the Court of Appeals denied Bridgestone’s request to accept jurisdiction of the appeal. Bridgestone then filed a request for rehearing and a second motions panel granted the request. Mayberry then argued to the panel hearing the appeal that the denial by the first panel divested the Court of Appeals of further jurisdiction in the case.

The court holds that the matter was still “in fieri” (meaning “in process of formation or development, hence, incomplete or inchoate”) and the Court of Appeals had jurisdiction to reconsider its earlier denial.

Lessons:

1. The court emphasizes it “will not entertain routine repetitive motions to accept or oppose discretionary interlocutory appeals.”
2. But, if you have good grounds, file the motion to reconsider.
3. Protection of an important trade secret will usually provide good grounds for allowing an interlocutory appeal.

P.S.: Bridgestone still lost on the appeal—the court finding that in light of the allegation that the formula in question was defective, plaintiff was entitled to discovery with a protective order barring disclosure to any person not directly an employee, litigant or expert employed by the parties. Note that Mayberry was not a competitor but a personal injury plaintiff.

9. Negligent infliction of emotional distress. State Farm Mutual Automobile Insurance Company v. Jakupko, 2006 WL 3333901 (Ind. Ct. App. 11/17/06)(Najam)

Richard Jakupko suffered severe injuries including quadriplegia and permanent mental deficits in a motor vehicle accident. His wife and two children were in the car and witnessed his severe injuries. They asserted claims for negligent infliction of mental distress and sought to recover under underinsured motorist coverage provided by State Farm.

In *Doe v. Lafayette School Corp.*, 846 N.E.2d 691 (Ind. Ct. App. 2006), another panel of the Court of Appeals recently stated that negligent infliction of emotional distress is not an independent tort. It suggested that a negligent infliction claim is contingent upon proof of a separate, underlying tort.

In the instant case, the court finds there is no such requirement. It recognizes that a negligent infliction of emotion distress claim is freestanding and not vicarious or derivative of any other claim. In so holding, the court notes that there are several Indiana Supreme Court cases to this effect but none in the Court of Appeals and a couple of recent Court of Appeals cases to the contrary.

Lessons:

1. Negligent infliction of emotional distress is an independent tort.
2. Sometimes clear error slips into appellate court decisions.
3. Shepardize even recent decisions.

10. Jury costs for late settlement. Coan v. Nightingale Home Healthcare, No. 1:05-101 (S.D. Ind. 11/7/06)(Hamilton)

On the morning this matter was scheduled for trial by jury, the parties settled their dispute. Nineteen prospective jurors had reported for duty, resulting in per diem and mileage costs of \$1,333.96. Judge Hamilton ordered plaintiff and defendant to each pay one-half of these costs.

Local Rule 42.1 states: “Whenever any civil action scheduled for jury trial is settled or otherwise disposed of in advance of the actual trial, then, except for good cause shown, juror costs, including marshal’s fees, mileage and per diem, shall be assessed as agreed by the parties, or equally against the parties *and/or their counsel*, or otherwise assessed as directed by the Court unless the Clerk’s office is notified at least one full business day prior to the day on which the action is scheduled for trial in time to advise the jurors that it will not be necessary for them to attend.”

Lessons: Don’t wait until you get to the courthouse steps to settle.

11. Jurisdictional statements. Smoot v. Mazda Motors of America, Inc., No. 05-4577 (7th Cir. 11/29/05)(Posner)

Plaintiffs-appellants sued in state court for injuries arising when an airbag deployed. The case was removed to federal court. After barring the appellants’ expert from testifying, the district judge dismissed the case on the ground that without expert testimony the appellants could not prove their case.

The first issue addressed on appeal concerned perceived inadequacies in both the appellants’ and appellees’ jurisdictional statements. Among the errors was appellants’ statement that jurisdiction was based on diversity of citizenship “and the jurisdictional amount of \$75,000”

when the statute requires that the amount *exceed* \$75,000. Appellants reported that one of the corporate defendants was incorporated in California but failed to state where it had its principal place of business. Corporations are dual citizens of both the state of incorporation and the state where the principal place of business is located.

The appellees' brief states that appellants' jurisdictional statement "is neither complete [n]or correct" but "[n]either, it turns out, is appellees'." Appellees' errors include stating that the appellees are "citizens of a different state" from the appellants, when one of the defendants is actually a citizen of a foreign country. The court asked both parties to submit supplemental jurisdictional statements and found those statements to be likewise deficient.

Judge Posner writes (in an opinion joined by Chief Judge Easterbrook):

"We have been plagued by the carelessness of a number of the lawyers practicing before the court of this circuit with regard to the required contents of jurisdictional statements in diversity cases. . . . It is time . . . that this malpractice stopped. We direct the parties to show cause within 10 days why counsel should not be sanctioned for violating Rule 28(a)(1) and mistaking the requirements of diversity jurisdiction. We ask them to consider specifically the appropriateness, as a sanction, of their being compelled to attend a continuing legal education class in federal jurisdiction."

"Are we being *fusspots and nitpickers* in trying (so far with limited success) to enforce rules designed to ensure that federal courts do not exceed the limits that the Constitution and federal statutes impose on their jurisdiction? . . . It would be delightful, but irresponsible in the extreme, for us to ignore the limits on jurisdiction, . . . and jump directly to the merits of any case that the parties would like to litigate in federal court."

Judge Evans wrote a concurring opinion, declining to join in Judge Posner's "stinging criticism" of the attorneys regarding their "less-than-perfect jurisdictional statements." Evans writes: "Sure, the plaintiffs should have said the amount in controversy *exceeds* \$75,000, not that it *is* \$75,000. And sure, both sides stumbled on their declarations regarding the dual citizenship of the corporate defendants. But, at best, these are low misdemeanors; yet the court treats them like felonies."

Judge Evans goes on: "What happened in this case is not particularly unusual. The plaintiffs, represented by what appears to be a small law firm, filed this suit almost five years ago in state court where jurisdictional requirements are easily satisfied and rarely questioned. The defendants, represented by "a national law firm with lawyers in 27 offices coast-to-coast" (according to the firm's web site) removed the case to federal court. That there is diversity jurisdiction has never been questioned by anyone, including at least two district court judges who issued written decisions as the case poked along for four years through discovery and several in-court proceedings. The plaintiffs then lose their case on summary judgment and file an appeal raising the issue that cuts to the very heart of their suit. Given this situation, when all eyes are really on the guts of the case, I think we should be more tolerant of the jurisdictional statement hiccups that have occurred here."

P.S.: A "fusspot", like a fussy budget, is a fussy or needlessly fault finding person.

Advocacy Tip of the Month: Do not move to strike portions of an opponent's appellate brief.

In *Custom Vehicles, Inc. v. Forest River, Inc.*, 464 F.3d 725 (7th Cir. 9/25/06), the appellant moved to strike portions of the appellee's brief, purportedly because it contained unsupported statements of fact. The motion was denied with the following comments from Chief Judge Easterbrook:

“The motion came to me during my stint as the motions judge. It is now denied—and to show that such absurd motions do not come for free, I deduct twice the length of the motion from the permissible length of the offending party’s reply brief. . . .

The way to point out errors in an appellee’s brief is to file a reply brief, not to ask a judge to serve as editor. . . .

[T]he court sometimes strikes entire briefs, either because they so substantially violate the Rules of Appellate Procedure that it would not be worth judicial time to work through them, or because they overlap the presentation of other litigants on the same side, in violation of a scheduling or consolidation order

But editing a brief? That’s a different kettle of fish. The sort of motion Custom Vehicles has filed does nothing but squander time. . . .

I see about one such motion during each week that I act as motions judge. I have never granted such a motion (and never will); I don’t believe that any of my colleagues grants such motions; yet the flow continues. . . .

For some time I have been treating such motions as a form of ‘advance’ on the allowance of pages or words used for the party’s appellate brief. . . . So . . . a pointless five-page motion was deducted from the allowable total I have decided to raise the stakes and deduct from the brief double the number of words in a motion to edit an opponent’s brief *or any other equivalently absurd, time-wasting motion.*”

[Thanks to Judge Jeffrey Boles for suggesting this very interesting case].